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Personal Jurisdiction over Foreign Directors in Cross-Border Securities Litigation

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Personal Jurisdiction over Foreign Directors in Cross-Border Securities Litigation

Hannah L. Buxbaum*

I. INTRODUCTION	72
II. THE SECURITIES-RELATED ROLES OF FOREIGN DIRECTORS	73
A. <i>Sources of Securities-Related Governance Obligations</i>	74
B. <i>Sources of Civil Liability for Failure to Fulfill Securities-Related Governance Obligations</i>	76
III. PERSONAL JURISDICTION OVER FOREIGN DIRECTORS IN U.S. COURTS	78
A. <i>Establishing Personal Jurisdiction over Foreign Defendants: General Requirements</i>	78
1. <i>Statutory Authority</i>	78
2. <i>Constitutional Limitations</i>	79
B. <i>Application of Jurisdictional Standards in Securities Cases</i>	80
1. <i>Establishing Sufficient Contacts with the United States</i>	80
a. <i>Contacts Imputed on the Basis of Defendant's Status</i>	80
i. <i>Status as Control Person</i>	80
ii. <i>Status as Board Member</i>	82
b. <i>Contacts in the Form of Specific Acts</i>	82
i. <i>Acts Occurring Within the United States</i>	83
ii. <i>Acts Occurring Outside the United States</i>	83
2. <i>The "Reasonableness" Requirement</i>	86
IV. ALIGNING JURISDICTIONAL LAW AND SECURITIES ENFORCEMENT GOALS	87
A. <i>Increased Reliance on Public Enforcement</i>	88
B. <i>A Consent-Based Model of Jurisdiction in Cross-Border Securities Litigation</i>	90
C. <i>Presumptions of Jurisdiction in Particular Categories of Claims</i>	92
V. CONCLUSION	95

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I. INTRODUCTION

Securities fraud has increasingly become a global economic problem. It is endemic in many domestic markets, such that its aggregate impact, calculated globally, is significant.¹ Furthermore, as a result of the growth in foreign exchange listings, global securities offerings, and cross-border investment activity, securities fraud perpetrated in one market often affects others. The regulatory community has developed a range of mechanisms that explicitly address securities fraud as a global issue. These include cooperation and coordination instruments such as bilateral memoranda of understanding between regulatory agencies, as well as the work of multilateral organizations such as the International Organization of Securities Commissions.² In addition, and increasingly, private litigation—particularly in U.S. courts³—functions as a tool to combat international securities fraud.

The use of private enforcement in U.S. courts to address cross-border fraud has proved complicated. This is not surprising: Rule 10b-5 under the Securities Exchange Act of 1934 (Exchange Act), which serves as the basis for most private fraud litigation, creates only an implied cause of action and therefore contains no legislative guidance concerning its application in cases with foreign elements. The most fundamental issue in cross-border cases—the extent of the reach of U.S. securities laws—therefore remains disputed.⁴ In addition, the deployment of both express and implied rights of action in the cross-border context often creates significant jurisdictional and procedural complications. Courts addressing cross-border securities cases have grappled with questions such as the advisability of using prudential doctrines such as *forum non conveniens* to dismiss predominantly foreign cases;⁵ the availability of judicial assistance to foreign courts when parallel litigation is underway in another country;⁶ and the appropriateness of certifying plaintiff classes that include investors from countries that do not themselves permit class actions.⁷ This Article considers another such issue: the circumstances under

1. See generally TECHNICAL COMM. OF THE INT'L ORG. OF SEC. COMM'NS, STRENGTHENING CAPITAL MARKETS AGAINST FINANCIAL FRAUD (2005), available at <http://www.iosco.org/library/pubdocs/pdf/IOSCPD192.pdf> (noting that a surge in global financial scandals had prompted the committee to form an international task force to investigate financial fraud).

2. For recent treatments of developments in international securities regulation, see generally Michael D. Mann, William P. Barry & Alon Cohen, *Developments in the Internationalization of Securities Enforcement*, 1743 PLI/Corp 789 (2009); Roberta S. Karmel & Claire R. Kelly, *The Hardening of Soft Law in Securities Regulation*, 34 BROOK. J. INT'L L. 883 (2009).

3. Although private enforcement of securities laws plays an especially prominent role in the United States, it is on the rise in other jurisdictions as well. See, e.g., Stefano M. Grace, *Strengthening Investor Confidence in Europe: U.S.-Style Securities Class Actions and the Acquis Communautaire*, 15 J. TRANSNAT'L L. & POL'Y 281, 290 (2006) (describing the increase in private enforcement procedures in Europe).

4. See Stephen J. Choi & Linda J. Silberman, *Transnational Litigation and Global Securities Class-Action Lawsuits*, 2009 WIS. L. REV. 465 (2009); Hannah L. Buxbaum, *Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict*, 46 COLUM. J. TRANSNAT'L L. 14, 57 (2007) (analyzing current doctrine on the extraterritorial application of U.S. securities laws).

5. See, e.g., *Howe v. Goldcorp Invs., Ltd.*, 946 F.2d 944, 950–51 (1st Cir. 1991) (applying *forum non conveniens* to an American shareholder's securities fraud claims against a Canadian corporation).

6. See, e.g., *Schmitz v. Bernstein Liebhard & Lifshitz, LLP*, 376 F.3d 79, 85–86 (2d Cir. 2004) (addressing a petition for discovery assistance by plaintiffs in a German securities lawsuit).

7. See, e.g., *In re Vivendi Universal, S.A.*, 242 F.R.D. 76, 94–95 (S.D.N.Y. 2007) (assessing the likelihood that courts in various countries would recognize the preclusive effect of a settlement or judgment

which the directors of foreign companies may be subject to the personal jurisdiction of U.S. courts.⁸

When a foreign company participates in U.S. capital markets, its directors assume certain governance responsibilities related to that participation. As a consequence, they face potential liability under U.S. law for failures to fulfill those responsibilities. Like the directors of U.S. companies, then, foreign directors may be sued by private plaintiffs seeking monetary damages in civil litigation. Unlike their U.S. counterparts, however, foreign directors are not always subject to the personal jurisdiction of U.S. courts. In the context of cross-border fraud, jurisdictional law therefore creates a barrier to the use of private litigation in enforcing director accountability requirements.

Part II of this Article sketches out the governance obligations assumed by the directors of foreign companies that engage in U.S. securities activity, and the potential liability of those directors under the securities laws. Part III then turns to the law governing personal jurisdiction of foreign defendants in U.S. courts, and examines its application in the context of securities litigation. It identifies some inconsistencies in how courts have applied jurisdictional standards to cross-border securities cases, traceable in part to the fundamental vagueness of the constitutional due process requirements underpinning those standards. The Article then explores the tension between jurisdictional law and the enforcement goals reflected in the securities laws, and, in Part IV, considers three possible ways to reduce that tension. It ultimately proposes that courts adopt jurisdictional presumptions designed to reflect Congress' intent in imposing certain express accountability requirements upon directors. These presumptions, I argue, will satisfy the due process protections embodied in jurisdictional law, while bringing that law into better alignment with regulatory expectations regarding the responsibility of corporate directors for an issuer's securities activity.

II. THE SECURITIES-RELATED ROLES OF FOREIGN DIRECTORS

Foreign companies participate in the U.S. equity markets at a variety of levels of engagement. Some arrange for the sale of their ordinary shares to U.S. investors in private placements that are exempt from U.S. registration requirements under the Securities Act of 1933 (Securities Act).⁹ Others list their shares on a U.S. national exchange, creating a public U.S. trading market for the foreign securities and thereby assuming ongoing reporting obligations under the Exchange Act.¹⁰ Many foreign

reached in a U.S. securities class action).

8. This Article addresses jurisdiction over the foreign (i.e., non-U.S. resident) directors of foreign companies, and uses "foreign directors" as a shorthand reference to that category. I do not address jurisdiction over the foreign directors of U.S. companies, or over U.S.-resident directors of foreign companies.

9. Rule 144A under the Securities Act creates an exemption for the private resale of securities to qualified institutional buyers. 17 C.F.R. § 230.144A (2009).

10. Section 12(a) of the Exchange Act, which requires registration under the Act of all securities traded on a national securities exchange, contains no general exemption for securities issued by foreign companies. *See generally* 15 U.S.C. § 78l (2006). As a result, foreign companies that list their ordinary shares on a national exchange must register, triggering the periodic reporting requirements of section 13(a). 15 U.S.C. § 78m(a) (2006). Foreign private issuers subject to those requirements must file annual reports, as well as current reports of material information. 17 C.F.R. § 240.13a-1 (2009); 17 C.F.R. § 240.13a-16 (2009). Unlike domestic issuers, however, they need not file quarterly reports. 17 C.F.R. § 240.13a-13(b)(2) (2009).

companies choose not to create a U.S. market in the foreign securities themselves, but instead to sponsor an American Depositary Receipt (ADR) program. Under such a program, a U.S. depository bank issues ADRs, each representing a certain number of shares of the issuer's ordinary shares, for purchase by U.S. investors.¹¹ Some of these programs are restricted to specific investors; for instance, ADRs may be sold in a private placement to qualified institutional buyers.¹² Many, however, are intended to create a public trading market for the issuer's securities in the United States; as a result, the issuer in question must comply with various registration and reporting requirements intended to protect U.S. investors.¹³ ADRs issued through a Level 1 program are traded on the over-the-counter market rather than on a national securities exchange; therefore, an issuer choosing that type of program assumes very few registration and reporting obligations.¹⁴ In a Level 2 program, the ADRs are listed on a U.S. exchange. Consequently, in addition to filing an initial registration statement with the Securities and Exchange Commission (SEC),¹⁵ the issuer must thereafter comply with periodic reporting requirements under the Exchange Act.¹⁶ Finally, an issuer may choose not merely to deposit existing shares into the program, but to issue new shares for purchase by U.S. investors in the form of ADRs. This requires the establishment of a Level 3 (capital raising) program, which involves additional registration requirements along with the assumption of periodic reporting obligations.¹⁷

When a foreign issuer engages in such securities activity in the United States, the governance obligations of the issuer's directors attach to that activity. As a result, the directors may be subject to liability in resulting litigation. This Part discusses the implications of participation in the U.S. markets for foreign directors.

A. Sources of Securities-Related Governance Obligations

The primary source of a corporate director's governance responsibilities is the law of the issuer's state of incorporation, since those responsibilities fall within the sphere of a corporation's internal affairs. As a result, the precise contours of director obligations vary across countries. Nevertheless, it is possible to confirm certain broad trends regarding securities-related oversight. The Organization for Economic Co-operation and Development's Principles of Corporate Governance, last revised in 2004, state that a board's responsibilities include the implementation of internal procedures designed to

11. Depository banks can also issue unsponsored ADRs without the issuer's involvement.

12. 17 C.F.R. § 230.144A (2009).

13. For a detailed discussion of these requirements, see J. WILLIAM HICKS, INTERNATIONAL DIMENSIONS OF U.S. SECURITIES LAW § 9:146–149 (2008–09).

14. The initial registration statement for such a program is filed on Form F-6. 17 C.F.R. § 240.12g3-2(b) (2009) creates a specific exemption from Exchange Act registration for these programs. An issuer taking advantage of this exemption must publish the annual report required by the laws of its home country on its website in English, but need not file a separate annual report with the SEC. § 240.12g3-2(b)(ii).

15. As with a Level 1 program, the initial registration statement for a Level 2 program is filed on Form F-6.

16. Issuers sponsoring a Level 2 program must file annual reports on Form 20-F (analogous to the Form 10-K used by domestic issuers), as well as current reports of material information on Form 6-K.

17. In connection with the offering itself, the issuer would be required to file a registration statement on Form F-1 or F-3 containing a prospectus; going forward, the issuer would be required to file an annual report on Form 20-F as well as current reports of material information on Form 6-K.

promote compliance with securities laws, among other regulatory regimes.¹⁸ The 2007 Report of the International Organization of Securities Commissions (IOSCO) Technical Committee confirms the “special role” of independent directors in this regard.¹⁹ The SEC has identified these as statements of best practices in the area of corporate oversight, suggesting that a “global trend” in favor of adopting audit committees could be identified.²⁰ Thus, regardless of an issuer’s country of incorporation, its directors are likely subject to a range of compliance obligations under local law in connection with its securities activity.

In addition, and more important for purposes of this discussion, directors of issuers incorporated under foreign law are subject to the requirements of U.S. law regarding securities-related governance if those issuers choose to list securities in the United States. Both inside and outside directors bear responsibilities for a corporation’s securities activity. Certain inside directors (typically, the CEO and CFO) may be directly involved in the preparation, filing, and dissemination of offering documents and ongoing reports related to that activity. Some are also required to fulfill specific signing and certification obligations under the securities laws.²¹ Additionally, the board as a whole shares signing responsibility regarding certain filings.²² One facet of the general oversight responsibility for outside directors in particular has been described as a “securities monitoring” role.²³ This role encompasses a variety of obligations directly related to the securities activity of corporate issuers, including:

- review of documents filed with the SEC, both in connection with securities offerings and related to periodic disclosure;²⁴
- oversight of outside auditors and enhanced financial oversight by members of the audit committee;²⁵
- approval of the audited financial statements included in filings with the SEC;²⁶ and
- independent assessment of whether all public disclosures made by the issuer

18. ORG. FOR ECON. CO-OPERATION & DEV., PRINCIPLES OF CORPORATE GOVERNANCE 62–63 (2004), available at <http://www.oecd.org/dataoecd/32/18/31557724.pdf>.

19. TECHNICAL COMM. OF THE INT’L ORG. OF SEC. COMM’NS, BOARD INDEPENDENCE OF LISTED COMPANIES 41 (2007), available at www.iosco.org/library/pubdocs/pdf/IOSCOPD238.pdf (describing the typical responsibilities of outside directors across jurisdictions).

20. Standards Relating to Listed Company Audit Committees, Securities Act Release No. 33-8220, pt. I, II.F.3.a (effective Apr. 25, 2003), available at <http://www.sec.gov/rules/final/33-8220.htm> [hereinafter Release No. 33-8220].

21. See 17 C.F.R. § 240.13a-14 (2009) (imposing certification requirements on the principal executive and principal financial officer of issuers filing annual reports, including on Form 20-F).

22. See 15 U.S.C. § 77f(a) (2006) (requiring registration statements to be signed by a majority of the issuer’s board).

23. Hillary A. Sale, *Independent Directors as Securities Monitors*, 61 BUS. LAW. 1375, 1375 (2006).

24. Treatment of Information Incorporated by Reference into Registration Statements, Securities Act Release No. 33-6335, 23 SEC Docket 401 (Aug. 5, 1981). For discussion of director obligations with respect to periodic disclosure, see JAMES A. FANTO, DIRECTORS’ AND OFFICERS’ LIABILITY § 6:2.2 (2d ed. 2008).

25. See 15 U.S.C. § 7241(a)(5) (2006); Lisa M. Fairfax, *Spare the Rod, Spoil the Director? Revitalizing Directors’ Fiduciary Duty Through Legal Liability*, 42 HOUS. L. REV. 393, 400–05 (2005) (describing Sarbanes-Oxley’s enhancement of this particular role).

26. See Fairfax, *supra* note 25, at 400–05.

are fair and accurate.²⁷

During the implementation of the Sarbanes-Oxley Act of 2002,²⁸ the extent to which U.S. securities law applies to foreign issuers, and in particular the extent to which it can affect matters of corporate governance ordinarily governed by foreign law, became a focal point of debate.²⁹ Sarbanes-Oxley introduced a number of requirements related to corporate oversight, including a requirement that any issuer covered by the Act establish an audit committee composed of independent directors.³⁰ This requirement conflicted with practices regarding board composition in other legal regimes, many of which did not provide for the appointment of independent directors to corporate boards.³¹ Its proposal therefore triggered a heated debate over the propriety of U.S. legislation mandating changes in the internal governance structure of foreign companies.³² While the final rule provided certain limited exemptions from particular requirements,³³ it made no general distinction between domestic and foreign issuers. In subjecting foreign boards to the Act's enhanced accountability and monitoring requirements, Congress and the Commission clarified the importance to U.S. lawmakers of imposing the same governance expectations on foreign issuers as on domestic ones.

B. Sources of Civil Liability for Failure to Fulfill Securities-Related Governance Obligations

A result of the application of U.S. securities laws to foreign issuers is that directors of those issuers—like directors of domestic companies—may be subject to civil liability under U.S. law if they fail to fulfill their securities-related responsibilities. Certain provisions of the securities laws create primary liability for individual directors. Section

27. Report of Investigation in the Matter of National Telephone Co., Inc., Relating to Activities of the Independent Directors of National Telephone Co., Inc., Exchange Act Release No. 34-14380, 135 SEC Docket 1393 (Jan. 16, 1978) (discussed in Sale, *supra* note 23, at 1379–88).

28. Sarbanes-Oxley Act, Pub. L. No. 107-204, 116 Stat. 745 (2002).

29. The concern that the Sarbanes-Oxley Act represented an encroachment on foreign corporation laws is a variation on the more general concern that it encroached significantly on areas of corporate governance historically reserved to the states of incorporation. See generally Jill E. Fisch, *The New Federal Regulation of Corporate Governance*, 28 HARV. J.L. & PUB. POL'Y 39 (2004).

30. Sarbanes-Oxley Act § 301, 15 U.S.C. § 78j-1 (2006); 17 C.F.R. § 240.10A-3 (2009). In its release adopting the rule regarding listed company audit committees, the SEC affirmed the critical oversight role of directors:

Effective oversight of the financial reporting process is fundamental to preserving the integrity of our markets. The board of directors . . . is the focal point of the corporate governance system. The audit committee . . . plays a critical role in providing oversight over and serving as a check and balance on a company's financial reporting system.

Release No. 33-8220, *supra* note 20.

31. See Roberta S. Karmel, *The Securities and Exchange Commission Goes Abroad to Regulate Corporate Governance*, 33 STETSON L. REV. 849, 874–77 (2004) (discussing some of the objections raised by foreign companies to the legislation as initially proposed).

32. See *id.* at 874 (describing the resulting “furor,” as well as some of the concessions later made by the SEC in its final rulemaking).

33. For instance, in systems that require employee participation on supervisory boards, an exemption was made from the independence requirements. 17 C.F.R. § 240.10A-3(b)(1)(iv)(C). In systems that provide for oversight of auditors by means of a separate board of auditors, the supervisory board need not include an audit committee. 17 C.F.R. § 240.10A-3(c)(3).

11 of the Securities Act, for instance, creates an express cause of action for claims in connection with the offering of securities.³⁴ That section provides that if a registration statement filed with the SEC contains a material misrepresentation or omission, a person who purchased securities offered pursuant to that statement may sue certain enumerated defendants, including individuals who were directors of the issuer at the time of the registration.³⁵ Directors may also face primary liability under the general antifraud prohibition established in section 10(b) of the Exchange Act and Rule 10b-5 thereunder, which create an implied cause of action for many forms of securities fraud. Finally, the express cause of action created by section 17(a) of the Securities Act provides an additional source of liability in civil enforcement proceedings initiated by the SEC.³⁶

The securities laws also impose derivative liability for an issuer's violation of anti-fraud provisions on that issuer's control persons. Section 20(a) of the Exchange Act defines control person to include any person who "directly or indirectly" controls any person liable under the Act;³⁷ section 15 of the Securities Act adopts a similar definition of control person in connection with violations of section 11.³⁸ Thus, directors who control the issuer may face secondary liability flowing from the issuer's conduct.³⁹

A variety of remedies are available in cases that allow director liability. While civil actions initiated by private plaintiffs generally seek monetary damages, those brought by the SEC take advantage of a broad range of judicial remedies, including civil monetary penalties; equitable relief, including disgorgement; injunctions against future violations; and bar orders against future service as a director or officer of a publicly traded company.⁴⁰

In sum, exposure to various forms of civil liability encourages foreign directors, like their U.S. counterparts, to comply with the accountability norms embodied in U.S. securities law. Unlike domestic directors, however, foreign directors are not always subject to the personal jurisdiction of a U.S. court. This potential exemption from jurisdiction creates an independent, and potentially significant, limitation on their liability for securities-related misconduct.

34. Securities Act of 1933, 15 U.S.C. § 77k(a) (2006).

35. *Id.* Liability under this section is limited significantly by the due diligence defense provided by section 11(b); for further discussion, see *infra* notes 120, 138 and respective accompanying text. Section 12(a)(2) creates similar liability for the sellers of securities on the basis of misrepresentations or omissions contained in a prospectus or oral communication. 15 U.S.C. § 77l(a)(2) (2006). Since directors are rarely "sellers" as that term has been defined in the jurisprudence, however, liability under this section is unlikely. Section 18(a) of the Exchange Act also creates a similar cause of action for misstatements or omissions in periodic reports; because purchasers must demonstrate actual reliance on the fraudulent statement in question in order to assert that cause of action, however, liability under that section is unlikely as well. Securities Exchange Act of 1934, 15 U.S.C. § 78r(a) (2006).

36. 15 U.S.C. § 77q(a) (2006).

37. 15 U.S.C. § 78t(a) (2006).

38. 15 U.S.C. § 77o (2006).

39. For discussion of this form of liability, as well as its limitations, see FANTO, *supra* note 24, § 6:4. In actions brought by the SEC rather than private plaintiffs, directors may also be subject to liability for aiding and abetting a securities violation. 15 U.S.C. § 78t(e) (2006).

40. For an overview of the judicial and administrative mechanisms available to the SEC, see DONNA M. NAGY ET AL., *SECURITIES LITIGATION AND ENFORCEMENT: CASES AND MATERIALS* 675–78 (2d ed. 2008).

III. PERSONAL JURISDICTION OVER FOREIGN DIRECTORS IN U.S. COURTS

A. Establishing Personal Jurisdiction over Foreign Defendants: General Requirements

Establishing the personal jurisdiction of a U.S. federal court⁴¹ over a foreign defendant involves two separate steps. First, the forum court must establish statutory authority to exercise jurisdiction; second, it must ascertain that the exercise of jurisdiction will not violate the defendant's constitutional right to due process.

1. Statutory Authority

In general, a federal court's statutory authority to exercise jurisdiction over a particular defendant derives from Rule 4(k)(1) of the Federal Rules of Civil Procedure, which authorizes it simply to borrow the "long-arm" statute of the state in which it sits.⁴² In claims arising under certain federal laws, however, jurisdiction may be based on Rule 4(k)(1)(C), which states that service of a summons establishes jurisdiction over a defendant "when authorized by a federal statute."⁴³ This is the case in claims brought under the federal securities laws. Section 27 of the Exchange Act provides that:

Any suit or action to enforce any liability or duty created by this Act . . . or to enjoin any violation of such Act . . . , may be brought in [the district wherein any act or transaction constituting the violation occurred] or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found.⁴⁴

Section 22 of the Securities Act contains similar language.⁴⁵ The result is the authorization of worldwide service of process over those alleged to have committed securities fraud. Because service of process is the means by which a court obtains jurisdiction, courts have concluded that where statutes provide for worldwide service of process, Congress intended personal jurisdiction for claims arising out of violations of securities law to extend to the limits of due process protection.⁴⁶ Thus, it is ultimately the constitutional step of the analysis that delimits the extent of personal jurisdiction over foreign defendants in securities cases.

41. The great majority of securities lawsuits are filed in federal court, particularly since enactment of the Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 (1998) (codified at 15 U.S.C. § 78bb(f) (2006)), which essentially foreclosed the option of filing securities class actions under state rather than federal law.

42. FED. R. CIV. P. 4(k)(1)(A) states that "[s]erving a summons . . . establishes personal jurisdiction over a defendant . . . who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located"

43. FED. R. CIV. P. 4(k)(1)(C).

44. 15 U.S.C. § 78aa (2006).

45. 15 U.S.C. § 77v (2006).

46. *See, e.g., SEC v. Carrillo*, 115 F.3d 1540, 1543 (11th Cir. 1997) ("Courts have reasoned that 'a federal statute which permits the service of process beyond the boundaries of the forum state . . . broadens the authorized scope of personal jurisdiction. Under such a statute, the question becomes whether the party has sufficient contacts with the United States, not any particular state.'" (quoting *Go-Video, Inc. v. Akai Elec. Co. Ltd.*, 885 F.2d 1406, 1414 (9th Cir. 1989))).

2. Constitutional Limitations

The constitutional due process analysis follows the framework established in *International Shoe*,⁴⁷ the landmark 1945 decision of the Supreme Court, and subsequent cases: (1) the defendant must have minimum contacts with the forum “such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice,’”⁴⁸ and (2) the exercise of jurisdiction, taking into account “the burden on the defendant, the interests of the forum State, and the plaintiff’s interest in obtaining relief,” must be reasonable.⁴⁹ When jurisdiction is based on a statute that authorizes worldwide service of process, as is the case under the securities laws, the minimum contacts relevant to establish personal jurisdiction are those with the United States as a whole rather than with any individual state.⁵⁰ The scope of the court’s jurisdiction relates to the extent of those contacts. If the defendant has engaged in systematic and continuous activity in the United States, the court may exercise “general jurisdiction” over it—in other words, the court may exercise jurisdiction in any claim against that defendant, whether arising from the U.S. contacts or not.⁵¹ If the contacts are insufficient to support general jurisdiction, the court may nevertheless reasonably exercise “specific jurisdiction” over the defendant in claims arising out of those contacts.⁵² In most transnational cases, the plaintiffs seek to establish specific jurisdiction over the defendants in claims arising out of securities activity connected to U.S. markets.

Importantly, the requirement of contacts with the United States can be met by contacts *outside* the United States, on the “effects” theory of personal jurisdiction.⁵³ According to this effects doctrine, if a foreign defendant engages in conduct outside the United States with the intent of causing tortious effect within the relevant U.S. forum, that conduct satisfies the minimum contacts requirement.⁵⁴ Courts apply this test restrictively, however. In an early securities case in the Second Circuit, Judge Friendly asserted the need to proceed “with caution, particularly in an international context,” and stated that

47. *Int’l Shoe Co. v. Washington*, 326 U.S. 310 (1945).

48. *Id.* at 316.

49. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 (1987). In the case of foreign defendants, the burden includes unique factors such as language differences, distance of travel, and the difficulties of defending oneself in a foreign legal system.

50. See *SEC v. Softpoint, Inc.*, No. 95 Civ. 2951 GEL., 2001 WL 43611, at *3–5 (S.D.N.Y. Jan. 18, 2001).

51. See *Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408, 414–15 (1984) (explaining the parameters of general jurisdiction).

52. See *McGee v. Int’l Life Ins. Co.*, 355 U.S. 220 (1957) (holding that even an isolated transaction in the forum state was sufficient to establish jurisdiction in a claim arising out of that transaction).

53. See RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 37 (1971) (“A state has the power to exercise judicial jurisdiction over an individual who causes effects in the state by an act done elsewhere with respect to any cause of action arising from these effects unless the nature of the effects and of the individual’s relationship to the state makes the exercise of such jurisdiction unreasonable.”). This doctrine is not to be confused with the “effects test” for *subject-matter* jurisdiction, which is used to determine the scope of the securities laws’ application to conduct or transactions occurring outside the United States. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 416(1)(c) (1987) (setting forth the bases for legislative jurisdiction in securities cases).

54. See *Calder v. Jones*, 465 U.S. 783, 789 (1984) (distinguishing “mere untargeted negligence” from “intentional, and allegedly tortious, actions . . . expressly aimed at [the forum state]”).

At a minimum the conduct must meet . . . the important requirement that the effect "occurs as a direct and foreseeable result of the conduct outside the territory." We believe, moreover, that attaining the rather low floor of foreseeability necessary to support a finding of tort liability is not enough to support *in personam* jurisdiction. The person sought to be charged must know, or have good reason to know, that his conduct will have effects in the state seeking to assert jurisdiction over him.⁵⁵

Albeit with such limitation, this doctrine therefore permits the exercise of jurisdiction over foreign defendants based on foreign conduct, even in the absence of direct contacts with the United States.

B. Application of Jurisdictional Standards in Securities Cases

1. Establishing Sufficient Contacts with the United States

The first requirement of the due process analysis is that the defendant has established sufficient contacts with the United States to justify the assertion of jurisdiction. In some international securities cases, plaintiffs have argued that the defendant's role as director of a U.S.-listed company is alone enough to create the requisite contacts. In others, they have pointed to specific acts or omissions by individual directors. This Part considers these variations in turn.

a. Contacts Imputed on the Basis of Defendant's Status

i. Status as Control Person

As noted above, the Exchange Act imposes derivative liability for an issuer's violation of securities law on that company's control persons.⁵⁶ Plaintiffs in transnational cases frequently argue that where personal jurisdiction has been established over an issuer, it should extend to that issuer's statutory control persons as well, merely by virtue of that status. As one court put it, this theory posits that "the control person standard automatically encompasses a jurisdictional inquiry. In other words, if [the defendant] fits the definition of a control person, [it is] automatically subject to the jurisdiction of United States courts"⁵⁷ A few courts have accepted this standard, which essentially imputes whatever minimum contacts were ascribed to the issuer to the control persons.⁵⁸

As most courts have recognized, however, the analysis of whether an individual meets the statutory definition of control person should not be viewed as a proxy for the jurisdictional analysis. One representative decision notes that

55. *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1341 (2d Cir. 1972).

56. See *supra* notes 37-39 and accompanying text.

57. *McNamara v. Bre-X Minerals Ltd.*, 46 F. Supp. 2d 628, 636 (E.D. Tex. 1999).

58. See, e.g., *San Mateo County Transit Dist. v. Dearman, Fitzgerald and Roberts, Inc.*, 979 F.2d 1356, 1358 (9th Cir. 1992) (when addressing a non-resident defendant, stating that "personal jurisdiction . . . exists if the plaintiff makes a non-frivolous allegation that the defendant controlled a person liable for . . . fraud"); *Derensis v. Coopers & Lybrand Chartered Accountants*, 930 F. Supp. 1003, 1014 (D.N.J. 1996) (suggesting, somewhat more vaguely, agreement with the standard articulated in *San Mateo County*, 979 F.2d 1356); *McNamara*, 46 F. Supp. 2d at 636.

[t]he broad understanding of control person liability adopted by the securities laws cannot on its own support personal jurisdiction. This approach would, as one persuasive opinion stated, “impermissibly conflate[] statutory liability with the Constitution’s command that the exercise of personal jurisdiction must be fundamentally fair.” . . . Though they may involve a similar contact-based analysis, ultimately, the two inquiries must be distinct. . . .⁵⁹

As this analysis properly recognizes, control person liability under the Exchange Act—created by statute—should not be confused with jurisdictional law—a constitutional matter. Maintaining the distinction between the two is important, not only to protect the constitutional dimension of jurisdictional analysis, but also for a practical reason: control-person status may be construed very broadly. Courts disagree about the standard to be applied in defining control;⁶⁰ some have held that control-person status can attach not only when an individual actually exercised control over particular corporate acts, but also when that individual had merely the potential to control them.⁶¹ Constitutional due process protection, on the other hand, looks to specific acts taken by a defendant with the intent of availing itself of the benefits of doing business in the forum in question.⁶² Thus, at least in jurisdictions adopting a broad reading of control-person status, using the statutory standard to satisfy the jurisdictional inquiry would undercut the substantive protections afforded by the constitutional requirement.

In some cases, plaintiffs have argued that even if an issuer’s contacts are not automatically imputed to its control persons, a showing that the control persons knew or should have known about the fraudulent conduct in question should be sufficient to establish jurisdiction over them. Some courts have rejected such claims as simply rephrasing the basic argument that contacts can be imputed to a control person on the basis of that person’s status.⁶³ Several have noted that control persons may, in that capacity, have specifically directed or approved the activities in question, thereby establishing the requisite contacts.⁶⁴ Such cases do not rely on the status of the defendant as a control person per se, however, but on the specific contacts established by that defendant, and therefore resemble a more traditional personal jurisdiction analysis.

59. *City of Monroe Employees Ret. Sys. v. Bridgestone Corp.*, 399 F.3d 651, 667 (6th Cir. 2005) (quoting *In re Baan Co. Sec. Litig.*, 245 F. Supp. 2d 117, 129 (D.D.C. 2003)).

60. See generally FANTO, *supra* note 24, § 6:4.1 (discussing the distinction between “pure control” and “control plus participation” standards).

61. See, e.g., *McNamara*, 46 F. Supp. 2d at 638 (noting that “the abstract power to control” was sufficient to establish control-person liability, and “[a]ctual exercise of that power” was not required).

62. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (noting that the “‘fair warning’ requirement [that a defendant’s activities may subject it to jurisdiction] is satisfied if the defendant has ‘purposefully directed’ his activities at residents of the forum, and the litigation results from alleged injuries that ‘arise out of or relate to’ those activities” (citation omitted)); *Hanson v. Denckla*, 357 U.S. 235, 253 (1958) (stating that “it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws”). See also *In re Baan Co. Sec. Litig.*, 81 F. Supp. 2d 75, 81–82 (D.D.C. 2000) (noting the “persistent insistence of the Supreme Court . . . that personal jurisdiction be premised on a showing that the defendant has, by his acts, purposefully availed himself of the forum’s benefits.”).

63. E.g., *In re Baan Co.*, 245 F. Supp. 2d at 117.

64. See *id.* at 131; see also *In re Royal Ahold N.V. Sec. & ERISA Litig.*, 351 F. Supp. 2d 334, 351–52 (D. Md. 2004) (suggesting that individual directors “who . . . , as control persons, approve the filing or disseminating of” forms with the SEC are subject to personal jurisdiction).

ii. Status as Board Member

A second, related theory—also dependent on considerations of status—is that board membership alone should satisfy the minimum contacts requirement.⁶⁵ Courts have rejected this theory as well. Mere status as a board member does not generally meet the restrictive effects basis for jurisdiction, under which the conduct in question must “directly and foreseeably” give rise to the effects within the United States.⁶⁶ Thus, several courts have held that even though board members may oversee transactions that later give rise to fraud claims, board membership in and of itself—and therefore, presumably, a shared oversight failure—are too weakly connected to the fraud to have directly and foreseeably given rise to the subsequent effects.⁶⁷ Indeed, courts have even held that status as officers of the issuer is insufficient absent a showing that the officers in question “issued any statements, effectuated any transactions, or authorized any acquisitions that constitute the misconduct alleged. . . .”⁶⁸

In sum, status-based arguments for jurisdiction have been unsuccessful. Despite a split of authority regarding the viability of the control-person theory of jurisdiction, the clear weight of precedent rejects it.⁶⁹ Moreover, even in some of the cases supporting it, it appears that an alternative basis for jurisdiction existed; for instance, in one case, while the court stated that the *prima facie* showing of control-person status was sufficient to make a *prima facie* showing of jurisdiction,⁷⁰ it also noted that the defendant’s own contacts with the United States would have provided an adequate basis of jurisdiction.⁷¹ An initial review of cases involving foreign directors yielded none in which the decision to exercise jurisdiction over a foreign director was based solely on that director’s status.

b. Contacts in the Form of Specific Acts

Because status-based arguments for jurisdiction have been largely unsuccessful, plaintiffs generally point to particular acts of a director in arguing that sufficient contacts have been established with the United States.

65. See *In re Alstom Sec. Litig.*, 406 F. Supp. 2d 346, 399 (S.D.N.Y. 2005) (describing plaintiff’s allegation that an individual defendant’s membership on the board was a sufficient basis for jurisdiction).

66. See *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326 (2d Cir. 1972); *supra* text accompanying note 55.

67. See *In re Alstom Sec. Litig.*, 406 F. Supp. 2d at 399; *Royal Ahold*, 351 F. Supp. 2d at 355 (“Personal jurisdiction over [an officer] cannot be based solely on the fact that he was on the supervisory board of a corporation with sufficient contacts in the U.S.”); *Charas v. Sand Tech. Sys. Int’l, Inc.*, 1992 WL 296406, at *4 (S.D.N.Y. 1992).

68. *In re Rhodia S.A. Sec. Litig.*, 531 F. Supp. 2d 527, 542 (S.D.N.Y. 2007).

69. See *City of Monroe Employees Ret. Sys. v. Bridgestone Corp.*, 399 F.3d 651, 667 (6th Cir. 2005); see also *In re Baan Co.*, 245 F. Supp. 2d at 129; *AT&T Co. v. Compagnie Bruxelles Lambert*, 94 F.3d 586, 591 (9th Cir. 1996); *Tracinda Corp. v. DaimlerChrysler AG*, 197 F. Supp. 2d 86, 99 (D. Del. 2002); *In re Parmalat Sec. Litig.*, 376 F. Supp. 2d 449, 454 (S.D.N.Y. 2005).

70. *McNamara v. Bre-X Minerals Ltd.*, 46 F. Supp. 2d 628, 639 (E.D. Tex. 1999).

71. *Id.* at 639 n.13. See also *In re Baan Co. Sec. Litig.*, 81 F. Supp. 2d 75, 79–81 (D.D.C. 2000) (reviewing status-theory cases and noting additional allegations of conduct related to the fraud by defendants involved).

i. Acts Occurring Within the United States

Occasionally, a foreign director will have engaged in conduct within the United States in connection with alleged fraud. This is more likely in the case of inside directors, who in the scope of their duties as officers may speak for the corporation or otherwise engage in securities-related activity in the United States. Interestingly, where plaintiffs allege specific acts in the United States as the basis of jurisdiction over foreign directors, inside directors have sometimes invoked a status-based *defense*. They assert some variation of an argument that if their activities within the United States were engaged in only within the scope of their employment, they should not be subject to personal jurisdiction. As with the status-based arguments for jurisdiction, courts have generally rejected the application of this “fiduciary shield” doctrine.⁷² One representative opinion stated that

[w]hile a forum cannot establish personal jurisdiction over foreign defendants based solely on their status as officers in a corporation that is alleged to have committed fraud in the United States, if the complaint sufficiently alleges that the defendants “had a direct personal involvement in a tort committed in the forum state,” then personal jurisdiction over the defendants does not conflict with the fundamental notions of fairness required by the due process clause.⁷³

Another court noted that even if the fiduciary shield doctrine were available, there were certain exceptions to its application that would apply in cases based on securities fraud.⁷⁴ When the director in question has engaged in securities-related conduct in the United States, then, that conduct will satisfy the minimum-contacts requirement.

ii. Acts Occurring Outside the United States

More often, the plaintiff’s argument for jurisdiction will rest on conduct of the director that took place abroad, in the issuer’s home jurisdiction, but caused effects in the United States. In the case of inside directors, plaintiffs are often able to establish specific conduct that leads to such effects—in the form of active involvement in creating and disseminating documents, or in speaking publicly for the corporation.⁷⁵ Outside directors,

72. Cf. *In re CINAR Corp. Sec. Litig.*, 186 F. Supp. 2d 279, 323–24 (E.D.N.Y. 2002) (stating that “the ‘fiduciary shield’ doctrine is still causing some confusion,” and concluding that it does not limit the exercise of jurisdiction over foreign defendants); *but see* *Tracinda Corp. v. DaimlerChrysler AG*, 247 F. Supp. 2d 579, 587–88 (D. Del. 2003) (noting that “[c]ourts . . . have concluded that where a board member’s only contact with the forum has been in the scope of his corporate capacity, the individual’s contact is insufficient to support the exercise of personal jurisdiction,” and apparently requiring evidence that the director “availed himself as an individual of the privileges of the United States”).

73. *In re Royal Ahold Sec. Litig.*, 351 F. Supp. 2d 334, 351 (D. Md. 2004) (citation omitted); *see also* *In re Application to Enforce Admin. Subpoenas Duces Tecum of the SEC v. Knowles*, 87 F.3d 413, 418 (10th Cir. 1996); *SEC v. Carrillo*, 115 F.3d 1540, 1547 (11th Cir. 1997).

74. *In re Royal Dutch/Shell Trans. Sec. Litig.*, 380 F. Supp. 2d 509, 550 n.10 (D.N.J. 2005) (“Moreover, even if the fiduciary shield doctrine were to apply in the instant case, the exceptions to this doctrine, (1) the commission of tortious acts in a corporate capacity, and (2) the violation of a statutory scheme that provides for personal, as well as corporate liability, are applicable.”).

75. *See In re Alstom S.A. Sec. Litig.*, 406 F. Supp. 2d 346, 401 (S.D.N.Y. 2005) (considering jurisdiction over an inside director, noting that “it would have been foreseeable to those creating and disseminating the [registration statements] that the documents would have an effect in the United States”).

in contrast, do not generally participate actively in the creation of corporate filings; nor do they generally speak for the corporation or otherwise make independent assertions that might contain misrepresentations.⁷⁶ It is therefore more difficult for plaintiffs to identify the sort of foreign conduct that will satisfy the effects test for jurisdiction, which, as noted above, requires that the conduct lead “directly and foreseeably” to the effects in the United States.⁷⁷

In litigation against outside directors, the act most commonly identified as a basis for personal jurisdiction is that of signing a filing with the SEC. A majority of the board must sign any offering documents⁷⁸ as well as the issuer’s annual report.⁷⁹ Several cases have held that the signing of such filings is a sufficient basis for personal jurisdiction over directors of foreign corporations in claims arising out of misrepresentations or omissions in those filings.⁸⁰ Because persons who sign them should know that the filings will be relied upon by investors in the United States, these courts reason, their act in signing meets the effects test.⁸¹

When the directors in question did not actually sign a document filed with the SEC, plaintiffs may attempt to show some other conduct that directly caused injury to investors in the United States. This may be possible where there is clear evidence of a director’s approval of a document giving rise to the claim.⁸² It is more difficult with respect to outside directors who merely play a traditional monitoring role. General allegations that

76. See *Sale*, *supra* note 23, at 1378, 1388.

77. See *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326 (2d Cir. 1972); *supra* text accompanying note 55; *SEC v. Unifund SAL*, 910 F.2d 1028, 1033 (2d Cir. 1990) (stating that the conduct in question must have had a “direct and an unmistakably foreseeable effect within the United States”); *In re Royal Ahold*, 351 F. Supp. 2d at 350.

78. 15 U.S.C. § 77f(a) (2006) (providing the signing requirements for a registration statement); SEC Form F-1 (Dec. 2008), available at <http://www.sec.gov/about/forms/formf-1.pdf>.

79. SEC Form 20-F (April 2009), available at <http://www.sec.gov/about/forms/forms20-f.pdf>. On signing-based liability generally, see Christian J. Mixer, *Individual Civil Liability Under the Federal Securities Laws for Misstatements in Corporate SEC Filings*, 56 BUS. LAW. 967 (2001).

80. *TCS Capital Mgmt., LLC v. Apax Partners, L.P.*, No. 06-CV-13447 (CM), 2008 WL 650385, at *12 (S.D.N.Y. Mar. 7, 2008); *In re Royal Ahold*, 351 F. Supp. 2d at 352; *In re Alstom*, 406 F. Supp. 2d at 399 (holding, at the stage of a motion to dismiss, that signed filings were sufficient to establish personal jurisdiction); *In re CINAR Corp. Sec. Litig.*, 186 F. Supp. 2d 279, 305 (E.D.N.Y. 2002). But see *In re AstraZeneca Sec. Litig.*, 559 F. Supp. 2d 453, 467 (S.D.N.Y. 2008) (denying plaintiffs’ request for leave to amend their complaint to allege that two directors had signed an allegedly fraudulent filing, stating that the “signing, undoubtedly in a foreign country, is insufficient for personal jurisdiction in this case”). See also *Tracinda Corp. v. DaimlerChrysler AG*, 364 F. Supp. 2d 362, 391 (D. Del. 2005) (holding that signing the registration statement was not sufficient to confer personal jurisdiction in a case in which the relevant claims were not Securities Act claims based on that registration statement).

81. See, e.g., *In re CINAR*, 186 F. Supp. 2d at 305–06 (finding that jurisdiction existed because “[a]s General Counsel, [defendant] must have known that the statement was released in connection with a secondary stock offering designed to attract American investment”).

82. In one such case, the plaintiff provided a letter from the defendant indicating that he had approved the filing in question. Although he had not signed the filing, the court concluded that it was “reasonable to conclude that [he] . . . knew or should have known that the Form 20-F he approved would be . . . relied on by potential investors,” and therefore that a prima facie showing of personal jurisdiction had been made. *Itoba Ltd. v. LEP Group PLC*, 930 F. Supp. 36, 41 (D. Conn. 1996). See also *In re Alstom*, 406 F. Supp. 2d at 401 (“If [the outside director] were sufficiently responsible for the contents and dissemination of the Registration Statements, then this fact would support the exercise of this Court’s jurisdiction”); *Apax*, 2008 WL 650385, at *12 (suggesting in dicta that the approval of documents would be sufficient to meet the jurisdictional standard).

defendants—as board members—had knowledge of particular misstatements or omissions, or authorized the distribution of reports containing them, are often rejected as a variant of the status-based theory.⁸³ Such allegations may meet with a procedural objection as well: they may be characterized as an attempt at group pleading, and rejected on that basis.⁸⁴ Thus, outside directors charged only with failure to monitor will typically not be subject to jurisdiction in the United States. As one court put it, “any fraudulent activities that Defendants may have committed in relation to [the issuer’s] public offerings cannot reasonably be deemed the ‘direct and foreseeable result’ of the alleged failure of an outside director residing in [a foreign country] to monitor the [corporation’s] affairs.”⁸⁵

One recent case, part of the litigation involving the Italian company Parmalat, explored the outer reach of jurisdiction based on a failure to supervise.⁸⁶ There, the Southern District of New York considered jurisdiction over an Italian economics professor who served on the Board of Statutory Auditors of Parmalat’s holding company. She had not signed any documents filed in the United States, but the Board on which she served had issued audit reports related to Parmalat’s financial and accounting controls.⁸⁷ The court considered these issues in the following way:

The complaint here alleges that Parmalat securities traded actively in the United States, that Parmalat made note offerings here, and that company documents including Statutory Board reports were posted on company web sites in English. All or much of this presumably was known to Prof. Martellini. In consequence, if plaintiffs can prove their allegations against Prof. Martellini [that she knew or should have known of fraud], it would be quite appropriate to conclude that her conduct in relation to the United States satisfied the minimum contacts test.⁸⁸

In that case, however, the court specifically noted that the plaintiffs’ allegations related not merely to a failure of oversight, but to specific representations, made in the reports

83. See *supra* Part III.B.1.a; see also *In re AstraZeneca*, 559 F. Supp. 2d at 467 (“A person’s status as a board member is not alone sufficient to establish jurisdiction.”).

84. See, e.g., *In re Royal Ahold*, 351 F. Supp. 2d at 354 (noting that the plaintiffs “include [defendant] in their broad group pleadings and allege that he acted as a control person, but they fail to note a single specific act” taken by him). Prior to the enactment of the Private Securities Litigation Reform Act of 1995 (PSLRA), most courts adopted a presumption that an issuer’s publication of documents such as annual reports or press releases represented the collective action of its officers and directors, thereby relieving plaintiffs of the need to attribute such publications to specific individuals. See *Wool v. Tandem Computers, Inc.*, 818 F.2d 1433, 1440 (9th Cir. 1987). While most often applied to officers, the doctrine could also be applied to directors with a particular oversight responsibility, such as those serving on an audit committee. See *In re Livent, Inc. Sec. Litig.*, 78 F. Supp. 2d 194, 219 (S.D.N.Y. 1999) (applying the doctrine to allegations against members of an issuer’s audit committee). Following the enactment of the PSLRA, many courts have concluded that the group pleading doctrine must be rejected as incompatible with that statute’s heightened pleading requirements. See *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 326 n.6 (2007) (recognizing the split among courts on this point, but declining to overturn the holding of the court below that, at least with respect to allegations of scienter, the group pleading doctrine is no longer available).

85. *Charas v. Sand Tech. Sys. Int’l, Inc.*, No. 90 Civ. 5638 (JFK), 1992 WL 296406, at *5 (S.D.N.Y. Oct. 7, 1992) (considering a foreign director of a Canadian company who was a citizen and resident of Japan).

86. *In re Parmalat Sec. Litig.*, 376 F. Supp. 2d 449 (S.D.N.Y. 2005).

87. *Id.* at 451–56.

88. *Id.* at 456.

issued by the board of auditors and in Parmalat's financial statements, claimed to have been either recklessly made or deliberately false.⁸⁹

2. The "Reasonableness" Requirement

To satisfy the constitutional due process requirements, even if a court concludes that the defendant has established sufficient minimum contacts with the United States, it must also find that the exercise of jurisdiction over that defendant would be reasonable. As the Supreme Court's decision in *Asahi* instructs,⁹⁰ reasonableness depends on the balance between the burden on the defendant, on the one hand, and the interests of the forum state and of the plaintiff, on the other. Additionally, as some courts have noted, the less substantial the defendant's contacts are with the forum, the more clearly the balance of these factors must weigh in favor of exercising jurisdiction.⁹¹ In securities claims as in other types of litigation, this standard makes for a fact-dependent and often unpredictable analysis.

Some courts hearing securities claims have focused primarily on the interests of the forum—in particular, on the interest of the United States in enforcing its regulatory laws.⁹² In *In re Royal Ahold*, for instance, the court concluded that "the burden on the defendants is outweighed. . . . [T]he United States has [an] interest in preventing fraud here, in protecting the integrity of its stock markets, in promoting investor confidence, and in providing relief under federal statutes to those harmed by securities fraud."⁹³ Other courts have focused more on the interests of the plaintiff in obtaining a remedy. This analysis may cut either way. In *Parmalat*, a case in which the issuer was insolvent, the court's emphasis on the plaintiff's interests led to an extension of jurisdiction over a foreign director. The court recognized the potential litigation burden on the Italian defendant, but stressed "most notably the interest of the United States in securing relief . . . for U.S. citizens injured here"⁹⁴ By contrast, in litigation involving the Japanese tire manufacturer Bridgestone, the court's focus on the plaintiff led to the opposite result. The Sixth Circuit Court of Appeals there noted:

The key defendants, we think, are Bridgestone and Firestone, the two corporate entities with substantial ongoing business affairs in the United States. The court's personal jurisdiction over the corporate defendants . . . is conceded.

89. *Id.* at 452. Although the court concluded that there was a sufficient basis for the exercise of personal jurisdiction, it limited that jurisdiction to claims arising out of the effects in the United States—in other words, to the claims of U.S. investors. *Id.* at 456–57. (Even those claims were then dismissed, for failure to allege the fraud with sufficient particularity.) See also *Tracinda Corp. v. DaimlerChrysler AG*, 197 F. Supp. 2d 86, 95 (D. Del. 2002) (noting that although the director in question did not sign the filing, he had been actively involved in its preparation and dissemination, which was held sufficient to warrant jurisdictional discovery). The claims in that case were later dismissed after discovery, largely on the basis that plaintiffs had failed to establish that their claims arose out of the defendants' contacts with the United States. *In re DaimlerChrysler AG Sec. Litig.*, 247 F. Supp. 2d 579 (D. Del. 2003).

90. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 (1987); see *supra* note 49 and accompanying text.

91. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); see also *In re Royal Ahold Sec. Litig.*, 351 F. Supp. 2d 334, 352–53 (D. Md. 2004).

92. This is a common focus in "national contacts" cases in which the claims are based on federal statutes.

93. *In re Royal Ahold Sec. Litig.*, 351 F. Supp. 2d 334, 353 (D. Md. 2004).

94. *In re Parmalat*, 376 F. Supp. 2d at 457.

Thus, the marginal addition of [Bridgestone's former president and CEO] would add little or nothing to the potential recovery should the plaintiffs ultimately prevail on the merits and be awarded damages "[N]o actual violation of securities laws would go unpunished, and any [recovery] is highly unlikely to be affected by [his] dismissal."⁹⁵

The court concluded that the interest of the forum and the interest of the plaintiff in obtaining relief—the two factors to weigh against the burden on the foreign defendant—were “relatively light.”⁹⁶ As these and other cases indicate, the reasonableness requirement can function in securities litigation as an independent limitation on personal jurisdiction over foreign directors, even when those directors have established sufficient contacts with the United States.⁹⁷

IV. ALIGNING JURISDICTIONAL LAW AND SECURITIES ENFORCEMENT GOALS

Two initial conclusions to be drawn from the above analysis relate simply to the status of the doctrine in this area. The first is that the scope of personal jurisdiction over foreign directors remains unclear. (Unfortunately, that conclusion applies in other substantive areas as well: U.S. law on personal jurisdiction over foreign defendants has long been criticized as incoherent and dysfunctional.⁹⁸) This vagueness results in certain system costs. Foreign issuers and the individuals serving as their directors experience uncertainty regarding the possible consequences of securities activity in the United States, and may, as a result of their inability to evaluate potential liability, refrain from engaging in that activity. In addition, cross-border securities claims tend to involve extensive litigation of jurisdictional questions, expensive in terms of costs to the litigants and burden on the judicial system.

The second conclusion is that, in certain respects, jurisdictional law does not mesh well with the substantive goals of securities enforcement. Here the issue is not one of general costs, but rather of the possibility that jurisdictional rules will interfere with effective securities regulation. The focus on signing as an act of jurisdictional significance provides one illustration of this problem. Section 11 of the Securities Act contemplates liability on a fraudulent registration statement for all directors of the issuer,⁹⁹ but only a majority of the issuer's board is required to sign a registration statement.¹⁰⁰ By often requiring an actual signature as a predicate for personal jurisdiction, the jurisdictional rules largely preclude liability for foreign outside directors

95. *City of Monroe Empl. Ret. Sys. v. Bridgestone Corp.*, 399 F.3d 651, 666 (6th Cir. 2005).

96. *Id.* The court went on to note that “[t]hrough the United States and the class plaintiffs of course have an interest in the enforcement of federal securities laws, those interests as against [the former president] are tempered in the circumstances of this case.” *Id.* (Interestingly, the defendant in this case was not merely a director, but a former chief officer of the issuer. *Id.* at 655.)

97. *See, e.g., In re Royal Ahold*, 351 F. Supp. 2d at 352 (“Even though [defendants] have sufficient minimum contacts with the United States, the court must determine whether the exercise of jurisdiction over these individuals is reasonable.”); *cf. SEC v. Softpoint, Inc.*, No. 95 Civ. 2951 GEL, 2001 WL 43611, at *5 (S.D.N.Y. Jan. 18, 2001) (assuming that the burden on a defendant will hardly ever trump the federal interests at stake in claims based on federal statutes).

98. *See, e.g., Friedrich K. Juenger, A Shoe Unfit for Globetrotting*, 28 U.C. DAVIS L. REV. 1027 (1995).

99. 15 U.S.C. § 77k(a)(3) (2006).

100. § 77f(a).

who do not actually sign.¹⁰¹ The “reasonableness” element of the constitutional analysis provides a second illustration. In assessing whether an exercise of jurisdiction would be reasonable, a court is required to consider the strength of the plaintiff’s compensatory interest; that interest is one of the factors (along with the interests of the forum state) that must be balanced against the defendant’s litigation burden.¹⁰² From a securities enforcement standpoint, however, it is less clear that the compensatory interest of the plaintiff deserves substantial weight. If, as many courts and commentators have concluded, the primary purpose of the civil liability provisions is not to secure a remedy for the victim of securities fraud but to deter future violations,¹⁰³ then the extent of the plaintiff’s compensatory interest in a particular case should be considered relatively insignificant. In other words, the task should be simply balancing the defendant’s litigation burden against the regulatory interests of the United States. Of course, achieving the appropriate balance between deterrence and compensation is always an issue in the private enforcement of regulatory law; my point is simply that jurisdictional law and securities law might strike the balance differently.

These observations lead to the general question whether it might be possible to improve the alignment of jurisdictional norms with the expectations regarding director accountability embodied in our securities laws. The following Parts consider some possible mechanisms for doing so.

A. Increased Reliance on Public Enforcement

The tensions between jurisdictional rules and director accountability norms outlined above are somewhat less pronounced in the context of public enforcement than in private litigation. This is not because the constitutional analysis differs in the two contexts; the due process requirements that apply in a private civil proceeding also apply in a civil enforcement action brought by the SEC.¹⁰⁴ However, the SEC enjoys wide-ranging investigatory authority, as well as a broad range of enforcement options in administrative proceedings. Both may assist it in bringing its authority as regulator to bear in persuading individuals to consent to its jurisdiction.¹⁰⁵ In addition, the SEC has a significant

101. See, e.g., *In re Alstom Sec. Litig.*, 406 F. Supp. 2d 346, 400–01 (S.D.N.Y. 2005) (holding that absent the “affirmative act” of signing, an allegation that an outside director was listed as a signatory on a registration statement would not be enough to establish personal jurisdiction).

102. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 (1987).

103. See *Globus v. Law Research Serv., Inc.*, 418 F.2d 1276, 1288 (2d Cir. 1969) (“Civil liability under section 11 and similar provisions was designed not so much to compensate the defrauded purchaser as to promote enforcement of the Act and to deter negligence by providing a penalty for those who fail in their duties.”); see also John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 COLUM. L. REV. 1534, 1536 (2006) (noting that in an analysis of securities class action litigation, “deterrence . . . is the only rationale that can justify the significant costs—both public and private—that securities class actions impose on investors and the judiciary”); Amanda M. Rose, *Reforming Securities Litigation Reform: Restructuring the Relationship Between Public and Private Enforcement of Rule 10b-5*, 108 COLUM. L. REV. 1301, 1314–15 (2008) (discussing the rise of the deterrence justification for private securities litigation). See generally James D. Cox, *Private Litigation and the Deterrence of Corporate Misconduct*, 60 LAW & CONTEMP. PROBS., Autumn 1997, at 1 (exploring the deterrence value of private securities lawsuits).

104. See, e.g., *SEC v. Softpoint, Inc.*, No. 95 Civ. 2951 GEL, 2001 WL 43611, at *2–5 (S.D.N.Y. Jan. 18, 2001) (analyzing the due process requirements in a civil enforcement action).

105. One recent case may illustrate this point. In proceedings against Royal Ahold, a Dutch issuer, a

comparative advantage over private plaintiffs in cases involving cross-border fraud, due to cooperation agreements of various kinds that lessen certain procedural difficulties common in international litigation. For instance, the SEC has entered into bilateral Memoranda of Understanding, which provide for cross-border cooperation and enforcement assistance, with securities regulators in many other countries.¹⁰⁶ Thus, it is easier for the SEC to obtain access to documentary evidence located abroad than it is for a private plaintiff. Similarly, such instruments often permit the SEC to participate alongside foreign regulators in taking testimony from foreign witnesses—another procedural advantage over private litigants.¹⁰⁷

For these reasons, increasing the public enforcement of director accountability norms might be one way of ameliorating the jurisdictional problems. Such a step would be consistent with arguments made in the purely domestic context as well. Many commentators, pointing to the SEC's arsenal of investigative and remedial tools, have argued that SEC administrative and civil enforcement action is generally superior to private litigation in securing compliance with the accountability norms applicable to independent directors.¹⁰⁸

Even if the SEC were to assume a more active role in monitoring foreign directors, however, jurisdictional doctrine in its current state would continue to impair the effective enforcement of accountability norms in the international setting. This is due to certain consequences of the overlap between private and public enforcement. First, if U.S. courts were to adopt an increasingly restrictive view of jurisdiction over foreign directors, their decisions would create precedent applicable in public civil enforcement actions as well. This would render civil enforcement by the SEC a less powerful regulatory tool. In addition, such precedent might eventually encourage foreign directors to resist pressure

Commission administrative action was proceeding against a member of the issuer's supervisory board simultaneously with a private class action. *In re Ture Roland Fahlin*, Exchange Act Release No. 50,519, pt. II (Oct. 13, 2004), available at <http://www.sec.gov/litigation/admin/34-50519.htm>. The SEC obtained a cease-and-desist order against that board member, in which he admitted the Commission's jurisdiction for purposes of that proceeding. *Id.* Two months later, in the private case, the court concluded that minimum contacts had not been established that would support the exercise of personal jurisdiction. *In re Royal Ahold N.V. Sec. & ERISA Litig.*, 351 F. Supp. 2d 334, 354 (D. Md. 2004).

106. See SEC, SEC Framework for International Cooperation and Assistance, http://www.sec.gov/about/offices/oia/oia_crossborder.htm#framework (last visited Sept. 9, 2009) (providing general information on cross-border enforcement instruments, including these bilateral agreements, as well as the IOSCO Multilateral Memorandum of Understanding).

107. In a recent speech, Commissioner Aguilar credited the SEC's ability to obtain necessary documents in the Siemens investigation to such instruments. Luis A. Aguilar, Comm'r, SEC, Combating Securities Fraud At Home and Abroad (May 28, 2009), available at www.sec.gov/news/speech/2009/spch052809laa.htm; see also Mann et al., *supra* note 2, at 793–95, 803 (“The broad base of cooperation in evidence-gathering has had a significant effect on the types of litigation related to securities regulation. It is rarely an issue of whether documents can be obtained by a foreign regulator; the MOUs and MLATs work.”).

108. See Rose, *supra* note 103, at 1346 (“[T]he Commission has in its enforcement arsenal non-monetary sanctions, like officer and director bars, that serve as stronger deterrence weapons vis-à-vis individual wrongdoers than class damages, which fall primarily on corporations under principles of enterprise liability.”); Sale, *supra* note 23, at 1402 (describing the SEC enforcement powers and concluding that “the SEC process is arguably more efficient than private litigation” in enforcing the securities monitoring role of outside directors). On the overlap between public and private enforcement of the securities laws generally, see James D. Cox & Randall S. Thomas, with the Assistance of Dana Kiku, *SEC Enforcement Heuristics: An Empirical Inquiry*, 53 DUKE L.J. 737 (2003).

by the SEC to consent to jurisdiction even in administrative proceedings. The result would be to reduce the SEC's bargaining power. Alternatively, should U.S. courts move toward a more expansive view of jurisdiction, the international conflict generated by aggressive private litigation¹⁰⁹ might eventually impair the further development of the cooperation and coordination mechanisms that are so central to the success of cross-border public enforcement.¹¹⁰ In other words, regardless of whether the courts ultimately adopt a broad or a more restrictive view of jurisdiction, the interaction between public and private enforcement makes it impossible to view the former as a regulatory strategy entirely independent of the latter. Even apart from the desire to reduce the costs of, and international conflict created by, cross-border litigation, it therefore remains important to address the tension between jurisdictional law and the provisions of the securities laws governing director liability.

B. A Consent-Based Model of Jurisdiction in Cross-Border Securities Litigation

Minimum contacts with the United States, sufficient to satisfy constitutional due process requirements, form one basis for asserting personal jurisdiction over a foreign defendant. Where the defendant in question has consented to the jurisdiction of a U.S. court, however, no minimum-contacts analysis is required: that consent serves as an entirely independent basis of jurisdiction.¹¹¹ One straightforward way to clarify the jurisdictional status of foreign directors, then, would be to impose a listing requirement that an issuer's directors consent to jurisdiction in U.S. courts for all claims arising out of that issuer's securities activity.

Requiring foreign directors to consent to jurisdiction in the United States would have the two-fold benefit of eliminating expensive jurisdictional litigation and treating foreign directors of listed issuers the same as their domestic counterparts. In addition, while director consent would obviate the need for minimum-contacts analysis, it would nevertheless be compatible with the due process values underpinning that analysis. The conceptual foundation of the fairness standard embodied in the requirement of minimum contacts is the notion of "reasonable expectations"—that is, the idea that it is only fair to assert jurisdiction over a defendant if that defendant, by choosing to connect itself with the forum, could "reasonably anticipate being haled into court there."¹¹² At least with respect to foreign companies who have chosen to list their securities on U.S. markets, it is not unreasonable to assume that directors would expect that they could be sued there in cases arising out of that securities activity.¹¹³ The listing decision itself, which must be

109. See *infra* notes 117–18 and accompanying text for further development of this point.

110. See Gary B. Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 GA. J. INT'L & COMP. L. 1, 29 (1987) (noting the risk that "exorbitant jurisdictional claims can frustrate diplomatic initiatives by the United States, particularly in the private international law field"). Admittedly, this risk has not seemed to materialize in the particular context of securities enforcement, given the proliferation of bilateral and multilateral mechanisms.

111. RESTATEMENT (SECOND) CONFLICT OF LAWS § 32 (1971).

112. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 287 (1980) ("The foreseeability that is critical to due process analysis is . . . that the defendant's conduct and connection with the forum [State] are such that he should reasonably anticipate being haled into court there.").

113. In a related context, the Third Circuit considered whether a foreign company that had sponsored an ADR program in the United States—Level 1, and therefore not involving a public listing; see *supra* text

board-approved, would involve a consideration of the potential securities liability flowing from U.S. market participation. Indeed, as some observers have argued, potential litigation burden is one of the primary factors informing that decision.¹¹⁴ Therefore, a requirement that the directors of such companies expressly consent to personal jurisdiction in the United States would be consistent with due process standards applicable in the absence of consent.¹¹⁵

However, while a consent requirement would resolve the uncertainties caused by current jurisdictional doctrine, it would present several substantial disadvantages. First, by increasing the likelihood of suit in the United States, it might discourage some individuals from serving as directors of foreign companies.¹¹⁶ Second, and in my view problematically, it would play into the same criticism leveled at expansive assertions of subject-matter jurisdiction in cases with foreign elements—it would be viewed as yet another manifestation of the over-aggressive use of U.S. civil litigation to address matters that might better be solved abroad. Indeed, by explicitly extending U.S. jurisdiction to this group of foreign defendants, a consent requirement might exacerbate that criticism by increasing the likelihood that U.S. law would be applied to foreign conduct.¹¹⁷ The expansive role of U.S. courts in addressing cross-border economic harms contributes to the friction between the United States and other countries regarding certain elements of our civil justice system, including class actions and contingency fees.¹¹⁸ That friction worries those concerned about international relations. It also, albeit for entirely different reasons, worries those concerned about the impact of the litigation burden on the competitiveness of our capital markets.¹¹⁹

accompanying note 14—had thereby subjected itself to the jurisdiction of U.S. courts. *Pinker v. Roche Holdings Ltd.*, 292 F.3d 361, 361–62 (3d Cir. 2002). The court held that “by sponsoring an ADR facility, [the company] ‘purposefully avail[ed] itself of the privilege of conducting activities’ in the American securities market, and thereby established the requisite minimum contacts with the United States.” *Id.* at 371. It then concluded that “[a] foreign corporation that purposefully avails itself of the American securities market has adequate notice that it may be haled into an American court for fraudulently manipulating that market.” *Id.* at 371–72. Although that case addressed jurisdiction of the issuer itself rather than of that issuer’s directors, its analysis regarding the foreseeability of litigation in the United States is instructive.

114. COMM. ON CAPITAL MKTS. REGULATION, INTERIM REPORT OF THE COMMITTEE ON CAPITAL MARKETS REGULATION 11 (2006), available at http://capmktreg.org/pdfs/11.30Committee_Interim_ReportREV2.pdf (“Foreign companies commonly cite the U.S. enforcement system as the most important reason why they do not want to list in the U.S. market.”).

115. I recognize that some of the cases analyzing the contacts of foreign directors with the United States take a narrower view of what those directors might reasonably anticipate.

116. Some observers suggest that exposure to U.S. litigation dissuades many potential directors from serving in that capacity, thus limiting the pool of available talent. While foreign directors currently face at least the prospect of such litigation, under a consent requirement it would be more of a certainty.

117. As mentioned in the introduction, one of the most fundamental questions in cross-border securities litigation is whether—and to what extent—U.S. law reaches conduct occurring abroad. If U.S. courts were to adopt a restrictive view of personal jurisdiction over foreign directors, they would have fewer opportunities to apply U.S. securities law to the conduct of those directors. However, if a consent requirement were adopted, the set of claims to which U.S. law might be applied would expand.

118. See Buxbaum, *supra* note 4, at 63–64 (describing foreign hostility to the expansive role of U.S. courts).

119. See COMM. ON CAPITAL MKTS. REGULATION, *supra* note 114, at 11–12; see also COMM. ON CAPITAL MKTS. REGULATION, THE COMPETITIVE POSITION OF THE U.S. PUBLIC EQUITY MARKET 32 (2007), available at [http://capmktreg.org/pdfs/TGFC-CCMR_Report_\(5-26-09\).pdf](http://capmktreg.org/pdfs/TGFC-CCMR_Report_(5-26-09).pdf) (arguing that “the competitiveness of the U.S.

Finally, the extent to which a consent requirement would serve the fundamental goal of deterrence is unclear. Because inside directors are more likely than outside directors to have established contacts within the United States, the primary benefit of a blanket director consent requirement would be to confer jurisdiction over outside directors serving in a traditional oversight capacity. But even if foreign outside directors were subject to the jurisdiction of U.S. courts, the likelihood that they would face substantive liability in a private civil lawsuit is low. This is true for a number of reasons, including the elimination of civil liability for aiding and abetting,¹²⁰ the availability to individual directors of the due diligence defense,¹²¹ heightened pleading standards,¹²² and the introduction of proportionate liability in the absence of actual knowledge of fraud.¹²³ As a result of director indemnification and insurance practices, the likelihood that an outside director will incur actual out-of-pocket costs is even lower.¹²⁴ There are occasional counterexamples; for instance, the recent Worldcom litigation resulted in a settlement by the company's outside directors that included out-of-pocket payments.¹²⁵ Such cases are clearly exceptional, however.¹²⁶

In sum, with regard to the directors whom a consent requirement would be most likely to affect, the removal of jurisdictional barriers to lawsuits may be of little practical consequence.¹²⁷ In this light, the substantial negative consequences of requiring directors to consent to the jurisdiction of U.S. courts would not be outweighed by the marginal gain likely in enforcement benefits.

C. Presumptions of Jurisdiction in Particular Categories of Claims

Despite the fact that the lack of personal jurisdiction over directors may not significantly affect their eventual liability with respect to certain claims, there is nevertheless a class of claims that jurisdictional rules should not bar. These are claims

public equity market has significantly deteriorated in recent years" and advocating a decrease in "the burden of regulation and litigation . . . to help remedy the situation").

120. *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994).

121. This defense is available in situations in which liability is predicated on control person status. *See FANTO*, *supra* note 24, § 6:4.2.

122. The 1995 Private Securities Litigation Reform Act established a requirement, applicable to most forms of securities fraud, that any complaint based on a fraudulent misrepresentation or omission must specify the statement in question and, if made on information and belief, must "state with particularity all facts on which that belief is formed." 15 U.S.C. § 78u-4(b)(1) (2006). Where it is necessary for the plaintiff to establish that the defendant acted with a particular state of mind, the complaint must "state with particularity facts giving rise to a strong inference" that the defendant acted with that state of mind. 15 U.S.C. § 78u-4(b)(2).

123. 15 U.S.C. § 78u-4(f); applicable in section 11 claims via 15 U.S.C. § 77k(f)(2).

124. *See generally* Bernard Black, Brian Cheffins & Michael Klausner, *Outside Director Liability*, 58 STAN. L. REV. 1055 (2006) (analyzing applicable substantive and procedural law as well as indemnification practices, insurance practices, and settlement incentives, and concluding as an empirical matter that out-of-pocket liability for outside directors is extremely rare).

125. *In re Worldcom*, 388 F. Supp. 2d 319 (S.D.N.Y. 2005); *see also* Coffee, *supra* note 103, at 1552–53 (discussing some of the largest out-of-pocket settlements).

126. *See* Black, Cheffins & Klausner, *supra* note 124, at 1140 (describing this as "deterrence by occasional lightning strike").

127. Even in the *Parmalat* litigation, for instance—an outlier case in which personal jurisdiction over an outside director was recognized—the claim was ultimately dismissed for failure to allege fraud with sufficient particularity. *In re Parmalat Sec. Litig.*, 376 F. Supp. 2d 449, 459 (S.D.N.Y. 2005).

involving provisions of the securities laws in which Congress has expressly assigned particular governance obligations to directors. One important set of claims falling into this category are section 11 claims. Congress's clear intent in giving purchasers a cause of action against "every person who was a director" of the issuer at the time of a registration statement's filing was to assign responsibility for the accuracy of that statement to all members of an issuer's board.¹²⁸ Similarly, jurisdictional rules should not bar claims against directors who serve on an issuer's audit committee that arise out of fraud in the financial statements included in U.S. filings. Rules enacted pursuant to the Sarbanes-Oxley Act require issuers to establish audit committees meeting certain criteria of independence,¹²⁹ and to provide specific disclosure in their annual reports regarding the financial expertise of that committee.¹³⁰ Those rules reflect congressional intent to enhance the accountability of specific individuals for the accuracy of such filings; indeed, that enhancement was one of the primary goals of the Sarbanes-Oxley Act.¹³¹

Claims such as these, based upon fraud in a filing for which the director defendant bears a specific governance obligation expressly imposed by Congress, stand in contrast to claims based upon general anti-fraud provisions that allege the director's failure to monitor management. In my view, the difference between them is relevant to the jurisdictional analysis in cases involving foreign directors. Where the intent of Congress to hold a director accountable for the content of a particular filing is clear, permitting foreign directors to avoid potential liability for resulting fraud on jurisdictional grounds is inconsistent with that intent and leads to unequal application of the law. On the other hand, where the claim in question rests only on a foreign director's alleged failure to oversee the activities of a foreign issuer—a failure that implicates primarily the corporation law of the issuer's country of incorporation rather than U.S. securities law—the need to delimit the boundaries of U.S. judicial jurisdiction is at its strongest. There are, of course, claims that fall between these two poles—for instance, claims that are brought under general anti-fraud rules, but that allege not merely a failure of oversight but rather the active involvement of a director in fraudulent conduct.¹³² It is with respect to the claims at the two poles, however, that the jurisdictional analysis can be categorically, rather than on a case-by-case basis, aligned with the enforcement goals

128. It is important to note that registration statements on Form F-6—used in connection with Level 1 or Level 2 ADR programs—do not trigger section 11 liability at all. *See supra* notes 15–17 and accompanying text. Thus, this discussion addresses only claims arising out of fraud in registration statements covering either Level 3 ADRs or a foreign issuer's ordinary shares.

129. Sarbanes-Oxley Act § 301, 15 U.S.C. § 78j-1 (2006); § 78j-1(m); 17 C.F.R. § 240.10A-3 (2009).

130. Sarbanes-Oxley Act § 407, 15 U.S.C. § 7265 (2006).

131. Donald C. Langevoort, *On Leaving Corporate Executives "Naked, Homeless and Without Wheels": Corporate Fraud, Equitable Remedies, and the Debate Over Entity Versus Individual Liability*, 42 WAKE FOREST L. REV. 627, 636 (2007) ("The Sarbanes-Oxley Act of 2002 was essentially a response to the perceived inadequacy of 'gatekeeper' involvement of the sort provided by outside directors on audit committees . . ."). In the context of claims against officers rather than directors, I would add to this category of claims those arising out of fraud in filings for which Congress has imposed specific certification requirements on those officers. For example, rules enacted pursuant to the Sarbanes-Oxley Act provide that the CEO and CFO of a listed foreign company must sign certifications to be included with the company's annual reports. 17 C.F.R. § 240.13a-14 (2009) (applicable to filings on Form 20-F).

132. Certain kinds of administrative proceedings may fall between these poles as well, although in a very different context: for instance, a claim against a foreign director on the basis that the director controlled a person who engaged in insider trading of a foreign issuer's unlisted ADRs. 15 U.S.C. § 78u-1(a)(1)(B) (2006).

reflected in the securities laws.

This Article advocates a two-pronged presumption: (1) in a claim against a foreign director based upon a corporate filing with respect to which Congress has expressly created a director accountability requirement, there should be a strong presumption that the director is subject to the personal jurisdiction of the U.S. court; and (2) in a claim against a foreign director based only upon allegations that the director failed to meet his or her oversight responsibilities over management, there should be a strong presumption that the director is not subject to the personal jurisdiction of the U.S. court.

A presumption that a foreign director is subject to the jurisdiction of a U.S. court in cases where Congress has established specific director accountability requirements would be consistent with constitutional due process values on a theory of implied consent.¹³³ A director who assumes a responsibility for a particular filing that Congress has explicitly assigned to that director must be deemed to have consented to the jurisdiction of a U.S. court in litigation based on that filing.¹³⁴ Moreover, establishing such a presumption would not require a wholesale reorientation of the emerging jurisprudence regarding jurisdiction over foreign directors; rather, it would eliminate the vagueness of the constitutional analysis in the cases for which director accountability is most clearly demanded by Congress. As the analysis above suggests, under that jurisprudence the fulfillment of certification and signing requirements are already generally seen to establish the requisite minimum contacts; with respect to that prong of the jurisdictional analysis, then, the presumption would merely expand jurisdiction to cover non-signing directors in section 11 claims.¹³⁵ The primary effect of the presumption would be on the reasonableness prong of the analysis, which would be foreclosed as an independent basis for refusing jurisdiction over foreign directors.¹³⁶ In other words, in claims based on filings for which a foreign director bears an explicit accountability obligation, that director would be presumptively subject to jurisdiction in the United States despite the fact that litigating there might be burdensome.¹³⁷

133. See *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982) ("Because the requirement of personal jurisdiction represents first of all an individual right, it can, like other such rights, be waived. . . . A variety of legal arrangements have been taken to represent express or implied consent to the personal jurisdiction of the court.").

134. This presumption therefore adopts a narrower view of consent than that discussed in Part IV.B, *supra*: directors would be deemed to consent to jurisdiction not in all securities claims, but only in those alleging a failure to meet specific securities-related obligations.

135. It is here worth noting that section 11 liability does not attach in claims based on Form F-6 (used in Level 1 and Level 2 ADR programs). American Depositary Receipts, Securities Act Release No. 6894, 1991 WL 294145 (May 23, 1991). Therefore, foreign directors would be exposed to that liability only if the issuer had engaged in the public offering of securities to U.S. investors, whether in the form of ordinary shares or by means of a Level 3 ADR program. The presumption would also prevent misapplications of doctrines like the fiduciary shield doctrine to protect directors from Congressionally-imposed responsibilities.

136. Currently, as discussed above, courts that find that a defendant has established minimum contacts with the United States will nevertheless consider reasonableness as a second step of the jurisdictional analysis. See, e.g., *Alstom Sec. Litig.*, 406 F. Supp. 2d 346, 401 (2005) (indicating that an inside director who created and disseminated allegedly misleading documents would still have an opportunity to contest the reasonableness of an assertion of jurisdiction over him).

137. The presumption would therefore foreclose the application of the reasonableness requirement to protect directors, and even corporate officers, from litigation in the United States resulting from their failure to fulfill their statutory responsibilities. Compare this with the reasoning in *City of Monroe Employees Retirement*

Importantly, the proposed presumptions would affect only the jurisdictional status of foreign directors in U.S. litigation. Even when they would operate to treat an issuer's directors collectively, then—as in the section 11 context, where all directors would be presumed subject to jurisdiction—director liability would continue to be assessed individually under the relevant substantive provisions. Under that section, for instance, directors have the opportunity to establish a due diligence defense on an individualized basis.¹³⁸ Therefore, while a foreign director who had reasonably relied on management representations in approving a registration statement could not avoid a section 11 claim on jurisdictional grounds, the presumption would not affect her ultimate liability. Thus, the thrust of the presumptions would not be to expand or contract the substantive liability of foreign directors under securities law, but simply to align jurisdictional standards with Congress's regulatory expectations in shaping director behavior by means of specific accountability requirements.

V. CONCLUSION

The past decade has seen a steady and quite dramatic increase in securities litigation with foreign elements.¹³⁹ Resolving the jurisdictional and procedural questions that surround such claims is crucial to improving the efficiency of private litigation in the cross-border context. Yet the ultimate goal is not simply to streamline the process of private litigation—it is to shape an appropriate role for private enforcement within the complex matrix of mechanisms used to regulate global economic conduct. It is therefore critical to bear in mind the points at which private enforcement intersects with other U.S. enforcement strategies, including international enforcement efforts by the SEC, alone or in cooperation with foreign regulators. It is equally critical to remain aware of the effect on foreign relations of increased U.S. judicial activity in the international arena. Only with attention to this larger context can private litigation develop as an effective element of, rather than an interference with, global financial regulatory strategies.

System v. Bridgestone Corp., 399 F.3d 651 (6th Cir. 2005), where, considering jurisdiction over the issuer's former president and CEO, the court focused on the "substantial burden" that litigation would place upon the defendant, noting that "[he] is living in Japan, and is a retired senior citizen at that." *Id.* at 666.

138. See *Escott v. BarChris*, 283 F. Supp. 643, 684–97 (S.D.N.Y. 1968) (discussing the relational nature of the due diligence defense).

139. See CORNERSTONE RESEARCH, SECURITIES CLASS ACTION FILINGS: 2009 MID-YEAR ASSESSMENT 7, fig. 6 (2009), available at http://securities.stanford.edu/clearinghouse_research/2009_YIR/Cornerstone_Research_Filings_2009_MidYear_Assessment.pdf (providing statistics on the upward trend in class action filings against issuers with headquarters outside the United States).
